Supreme Court, U.S.
FILED
MAY 17 1996
CLERK

(2)

No. 95-1674

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOSEPH GOLDEN, ANGELO DEITOS, EDWARD JONES, IDA THOMASON, LUTHER PALMER, CAROLINE FORYS, JOSEPHINE THOMAS, JOHN HOYLE, ARTHUR SALLIS, THELMA SONGER, JOHN W. GALLOWAY and ROGER FARRAR, on behalf of themselves and a class of persons similarly situated,

Petitioners,

v.

KELSEY-HAYES COMPANY and HAYES WHEELS INTERNATIONAL, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JULIA A. MARTIN
Counsel of Record
KIRK D. MESSMER
MATKOV, SALZMAN, MADOFF & GUNN
55 East Monroe Street, Suite 2900
Chicago, Illinois 60603
(312) 332-0777

Attorneys for Respondents

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

34 pp

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether Plaintiffs can obtain a jury trial in an action for an injunction to recover future benefits under an ERISA-regulated welfare benefit plan.

PARTIES BELOW

Petitioners Joseph Golden, Angelo Deitos, Edward Jones, Luther Palmer, Caroline Forys, Josephine Thomas, Arthur Sallis, Thelma Songer, John W. Galloway and Roger Farrar were Plaintiffs in the District Court, and Petitioners for a writ of mandamus in the Court of Appeals. Ida Thomason and John Hoyle are not really Petitioners in this Court; they were original Plaintiffs, but the civil action was dismissed as to Thomason because she is neither a participant nor beneficiary of the welfare benefit plan, nor a member of the plaintiff class, and Hoyle is dead. Stephen Santangelo is a Plaintiff in the District Court, replacing John Hoyle, but is not a Petitioner in this Court.

Respondents Kelsey-Hayes Company and Hayes Wheels International, Inc. are Defendants in the District Court, and were Respondents in the Court of Appeals. Kelsey-Hayes Company is a wholly-owned subsidiary of Varity Corporation, a publicly traded corporation, and is now known as "VarityKelsey-Hayes Company." Respondent Hayes Wheels International, Inc. is publicly traded. It has agreed to merge with MWC Holdings, Inc., a publicly traded corporation. Neither Respondent has any non-wholly-owned subsidiary.

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTION PRESENTED	i
PARTIES BELOW	ii
TABLE OF AUTHORITIES	iv
COUNTER-STATEMENT OF THE CASE	2
REASONS THE WRIT SHOULD NOT BE GRANTED	7
I. THE DECISION BELOW FAITHFULLY FOLLOWED THIS COURT'S PRIOR PRONOUNCEMENTS	7
II. THE DECISION BELOW DID NOT CREATE A SPLIT BETWEEN THE CIRCUITS	21
CONCLUSION	25

TABLE OF AUTHORITIES

Cases	PAGE
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) .	17
Alexander v. Primerica Holdings, Inc., 819 F. Supp. 1296 (D. N.J. 1993)	17
Bair v. General Motors Corp., 895 F.2d 1094 (6th Cir. 1990)	16, 18, 21
Bidlack v. Wheelabrator Corp., 993 F.2d 603 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 291 (1993) ..	22
Biggers v. Wittek Indus., 4 F.3d 291 (4th Cir. 1993)	21
Blake v. Unionmutual Stock Life Ins. Co., 906 F.2d 1525 (11th Cir. 1990)	21, 24
Borst v. Chevron Corp., 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1699 (1995) ..	18, 21
Brown v. Retirement Comm. of Briggs & Stratton, 797 F.2d 521 (7th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987)	21, 22
Central States, Southeast and Southwest Areas Pension Fund v. Central Trans., Inc., 472 U.S. 559 (1985)	9
Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990)	*passim*
Cox v. Keystone Carbon Co., 894 F.2d 647 (3d Cir.), *cert. denied*, 498 U.S. 811 (1990)	18
Crocker v. Piedmont Aviation, Inc., 49 F.3d 735 (D.C. Cir.), *cert. denied*, 116 S. Ct. 180 (1995) .	20
Curtis v. Loether, 415 U.S. 189 (1974)	19
Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) .	19

Daniel v. Eaton Corp., 839 F.2d 263 (6th Cir.), *cert. denied*, 488 U.S. 826 (1988) 13, 21

Davis v. Huge, 91 L.R.R.M. (BNA) 2234 (E.D. Ky. 1975) 9

Edwards v. State Farm Mut. Auto. Ins. Co., 851 F.2d 134 (6th Cir. 1988) 14

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989) 9, 11

Flacche v. Sun Life Assurance Co., 958 F.2d 730 (6th Cir. 1992) 14

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) 9

Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990) 16

Houghton v. SIPCO, Inc., 38 F.3d 953 (8th Cir. 1994) 21

Howe v. Varity Corp., 36 F.3d 746 (8th Cir. 1994), *aff'd*, 116 S. Ct. 1065 (1996) 15, 16

Katsaros v. Cody, 744 F.2d 270 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984) 21

Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) 17

Litton Financial Printing Div. v. NLRB, 501 U.S. 190 (1991) 12

Local No. 92, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers v. Norris, 383 F.2d 735 (5th Cir. 1967) 9, 22

Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990) . 19

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 15

McCraw v. United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Indus., 341 F.2d 705 (6th Cir. 1965) 10

Meredith v. Allsteel, Inc., 1994 U.S. Dist. LEXIS 9861 (N.D. Ill. July 19, 1994) 23

Mertens v. Hewitt Assoc., 508 U.S. 248, 113 S. Ct. 2063 (1993) 8, 11, 15

Milwaukee Brewery Workers' Pension Fund v. Jos. Schlitz Brewing Co., 115 S. Ct. 981 (1995) ... 9

NLRB v. Amax Coal Co., 453 U.S. 322 (1981) .. 9

Nedd v. United Mine Workers, 556 F.2d 190 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) 9, 13, 22

Pension Benefit Guar. Corp. v. Alloytek, Inc., 924 F.2d 620 (6th Cir. 1991) 16

Porter v. Central States, Southeast & Southwest Areas Pension Fund, 98 L.R.R.M. (BNA) 3210 (N.D. Iowa 1978) 9

Reich v. Continental Casualty Co., 33 F.3d 754 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1104 (1995) 23

Richards v. General Motors, 850 F. Supp. 1325 (E.D. Mich. 1994) 15

Schwartz v. Gregori, 45 F.3d 1017 (6th Cir.), *cert. denied*, 116 S. Ct. 77 (1995) 17

Senn v. United Dominion Indus. Inc., 951 F.2d 806 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2992 (1993) 22, 23

Sichko v. Lewis, 191 F. Supp. 68 (W.D. Pa. 1960) . 9

Slaughter v. AT&T Info. Sys. Inc., 905 F.2d 92 (5th Cir. 1990) 10

Smith's Lessee v. McCann, 65 U.S. (24 How.) 398 (1860) 13

Sofo v. Pan Am. Life Ins. Co., 13 F.3d 239 (7th Cir. 1994) 23

Spinelli v. Gaughan, 12 F.3d 853 (9th Cir. 1993) . 21

Sprague v. General Motors, 804 F. Supp. 931 (E.D. Mich. 1992) 17, 18

Stewart v. KHD Deutz Corp., 75 F.3d 1522 (11th Cir. 1996) 24

Sullivan v. LTV Aerospace & Defense Co., ____ F.3d ____, 1996 U.S. App. LEXIS 10253 (2nd Cir. May 6, 1996) 21

Tull v. United States, 481 U.S. 412 (1987) 17, 19

Turner v. CF & I Steel Corp., 770 F.2d 43 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986) 21

UAW v. Auto. Glass Employees Fed'l Credit Union, 146 L.R.R.M. (BNA) 2865 (M.D. Tenn. 1994), *aff'd*, 72 F.3d 1243 (6th Cir. 1996) 13

UAW v. Park-Ohio Indus., 687 F. Supp. 338 (N.D. Ohio 1987), *aff'd*, 876 F.2d 894 (table) (6th Cir. 1989) 15

United Electrical Workers v. Amcast Indus. Corp., 634 F. Supp. 1135 (S.D. Ohio 1986) 10

United Steelworkers v. Connors Steel Co., 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989) 10

United Steelworkers v. New Jersey Zinc Co., 828 F.2d 1001 (3rd Cir. 1987) 10

United Steelworkers v. United Engineering, Inc., 52 F.3d 1386 (6th Cir. 1995) 16

Unitis v. JFC Acquisition Co., 643 F. Supp. 454 (N.D. Ill. 1986) 10

Varhola v. Doe, 820 F.2d 809 (6th Cir. 1987) .. 15

Varity Corp. v. Howe, 116 S. Ct. 1065 (1996) .. 9

Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981) ... 13, 21, 22

Statutes

LMRA § 301(a), 29 U.S.C. § 185 2

ERISA § 3(7), 29 U.S.C. § 1002(7) 12

ERISA § 3(8), 29 U.S.C. § 1002(8) 12

ERISA § 3(16), 29 U.S.C. § 1002(16) 13

ERISA § 4(a)(3), 29 U.S.C. § 1003(a)(3) 9

ERISA § 101(a), 29 U.S.C. § 1021(a) 13

ERISA § 102(b), 29 U.S.C. § 1022(b) 13

ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) .. 2, 12

ERISA § 514(c), 29 U.S.C. § 1144(c) 15

ERISA § 514(d), 29 U.S.C. § 1144(d) 15

Other Authorities

IV SCOTT ON TRUSTS § 281 (3d ed. 1967) ... 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOSEPH GOLDEN, ANGELO DEITOS, EDWARD JONES, IDA THOMASON, LUTHER PALMER, CAROLINE FORYS, JOSEPHINE THOMAS, JOHN HOYLE, ARTHUR SALLIS, THELMA SONGER, JOHN W. GALLOWAY and ROGER FARRAR, on behalf of themselves and a class of persons similarly situated,

Petitioners,

v.

KELSEY-HAYES COMPANY and HAYES WHEELS INTERNATIONAL, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

a. This is not, as Petitioners claim, just an action for breach of labor agreements, brought under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. This is really an action to recover benefits allegedly due under the terms of a welfare benefit plan, and to clarify rights to future benefits under the terms of the plan, filed under two statutes, not just one: LMRA § 301(a), and § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B). (Complaint ¶¶ 1-2; First Amended Complaint ¶¶ 1-2) Count I of the Complaint was brought under the LMRA, Count II under ERISA. Count III attempts to plead an estoppel claim under both statutes.

Counts I and II of the original Complaint sought, in identical terms, the following relief:

> (A) A declaratory judgment that Kelsey-Hayes is contractually obligated to provide class members and eligible dependents with the health care benefits negotiated by Kelsey-Hayes and the UAW for the duration of the lives of retirees and spouses and for the duration of the disability for employees who are totally and permanently disabled.
>
> (B) Preliminary and permanent injunctive relief requiring Kelsey-Hayes to reinstate the health care benefits negotiated by Kelsey-Hayes and the UAW for class members and eligible dependents for the duration of the lives of retirees and spouses and for the duration of the disability for employees who are totally and permanently disabled.
>
> (C) Judgment against Kelsey-Hayes in an amount equal to all costs and expenses sustained by class members and eligible dependents as a result of its refusal to provide health care benefits negotiated by Kelsey-Hayes and the UAW, including but not limited to:

(1) All premiums and co-pays paid by retirees, surviving spouses and employees for health care benefits which were formerly paid by Kelsey-Hayes.

(2) All direct payments and bills for health care which formerly were covered by the company paid health care plan.

(D) Judgment against Kelsey-Hayes in an amount to compensate class members for damages for mental distress and anguish suffered by class members as a result of Kelsey-Hayes's breach of the agreements and plans.

(E) Reasonable attorneys fees and costs of this lawsuit.

(F) Such further relief as may be deemed necessary and proper.

(R.1: Complaint pp. 9-10, 11-12, ¶¶ A-F; App. 20a-21a) The only "damages" sought were damages for mental distress and anguish. (Complaint pp. 9, 11, ¶ D) Plaintiffs stipulated to strike the prayer for mental distress damages, because such damages cannot be recovered under either ERISA or the LMRA. The District Court struck mental distress damages, in the same Order that struck the Jury Demand. (Pet. App. 37a, 52a) Plaintiffs amended paragraph C to insert the word "damages," more than a year after the case was filed, in an attempt to shore up their jury demand. (Pet. App. 17a n.10)

b. This civil action involves retired employees of Kelsey-Hayes Company who during their employment were represented for collective bargaining by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO ("UAW"), and five of its local unions; and surviving spouses of such retirees.

Since the 1960s Kelsey-Hayes has, pursuant to collective bargaining agreements ("CBAs") with the UAW and UAW Locals, provided generous health benefits to UAW retirees and surviving spouses. Over time Kelsey-Hayes gradually assumed the entire premium cost. But health care was never free to pensioners. Retirees still had certain co-payment requirements, certain benefits had an annual cap, and most benefits were limited to reasonable and customary charges with retirees responsible for excess charges.

Kelsey-Hayes sold its SPECO, Heintz, and Gunite plants to two other companies in 1987. (R. 19: Op. 2) All employees at those plants terminated their employment with Kelsey-Hayes at that time. Kelsey-Hayes' collective bargaining agreements at those plants have long since expired. Kelsey-Hayes has continued to provide welfare benefits to persons who retired from those plants before the sale, including UAW retirees and surviving spouses.

In December 1992, Kelsey-Hayes Company split into two companies: Kelsey-Hayes Company, which continued the brake business; and Hayes Wheels International, Inc. ("Hayes Wheels"), which continued the wheel business.[1] The two companies also split the sponsorship and administration of pension and welfare benefit plans for the pre-split retirees.

On April 26, 1993, Kelsey-Hayes and Hayes Wheels made separate announcements that they would modify health benefits provided to retirees and surviving spouses,

[1] Hayes Wheels is the entity that was the Kelsey-Hayes Company, but is renamed. The current Kelsey-Hayes Company was newly incorporated in December 1992, and assigned the rights and liabilities attendant to the brake and other non-wheel businesses.

effective January 1, 1994. The changes implemented included imposition of a monthly premium contribution; increased co-payments and annual deductible requirements; a change in the way coverage was coordinated with Medicare; and a lifetime benefit cap of $500,000 per beneficiary. Health benefits were not terminated for any person. The monthly premium was $41.00 for Joseph Golden, for medical, dental and hearing coverage for him and his wife; $84.20 for Edward Jones, a SPECO retiree who is not yet Medicare-eligible, and his wife; and $7.00 for Luther Palmer and his wife. (Affidavit of Golden ¶ 6; Affidavit of Jones ¶ 7; Affidavit of Palmer) Also, the "Special Age 65 Benefit" was eliminated. This was a monthly payment to pensioners who were at least 65 years old, to reimburse part of the cost of the Medicare Part B premium. Although this was a welfare benefit, this amount was added to the monthly pension check.

These changes were extended to all pensioners from Kelsey-Hayes' sold SPECO, Heintz and Gunite plants. The changes were also extended to pensioners from the Detroit and Romulus plants who were at least 65 years old and eligible for Medicare, pursuant to a provision in the CBAs that allows the Company to reduce or eliminate benefits to persons eligible for statutory benefit programs. No changes were implemented for any Brighton and Milford pensioners; nor for Detroit and Romulus pensioners who were not yet 65 years old, and thus not eligible for Medicare.

More than 90% of the class enrolled for the modified benefit program that went into effect on January 1, 1994. (Affidavit of Jill Wellman ¶ 12) For almost all of the persons who enrolled in the modified welfare benefit plan, the monthly contribution is deducted from their monthly pension check. (Affidavit of Caroline Forys, attachment;

Affidavit of Joseph Golden ¶ 7) This is done only if the pensioner consents to it in writing, in advance.

c. The named Plaintiffs are nominal. The UAW selected and retained their lawyers, and recruited the named Plaintiffs later. The UAW pays Plaintiffs' legal fees and costs, and posted the injunction bond. (R. 28)

Although Plaintiffs and the UAW had more than eight months' warning of the benefit changes, Plaintiffs did not file a motion for preliminary injunction until December 23, 1993—the last court day before Christmas, and only four court days before the benefit plan went into effect. The automobile industry, including Kelsey-Hayes and Hayes Wheels, shuts down every year from the close of business on December 23 until after the New Year holiday. By filing a motion for preliminary injunction on December 23, Plaintiffs' counsel ensured that, if a hearing was held before January 1, then it would be difficult for the Company's lawyers to contact management or prepare a substantive defense.

d. The benefit changes did not continue in effect for pensioners from the Detroit and Romulus plants. Those plants are still operating, and have collective bargaining agreements in place. UAW Local 78's contracts with Hayes Wheels and Kelsey-Hayes were scheduled to expire February 1, 1994, barely a month after the changes took place. During negotiations for new contracts, Kelsey-Hayes and Hayes Wheels entered into separate letter agreements with UAW Local 78, rescinding most of the changes for Medicare-eligible pensioners from the Detroit and Romulus plants, retroactive to January 1, 1994, subject to the outcome of this case. The only change that remains in effect is the $2.00 per month premium contribution for pensioners age 65 or older. As a result of those

agreements, Plaintiffs withdrew their request for a preliminary injunction in favor of Detroit and Romulus pensioners, and sought one only for pensioners from the sold SPECO, Heintz and Gunite plants.

The preliminary injunction became effective April 18, 1994. It reinstated the former benefit plan for Heintz, Gunite and SPECO pensioners.

e. On December 20, 1994, Plaintiffs filed a First Amended Complaint which added Hayes Wheels as a Defendant. It also slightly recharacterized the monetary relief sought: Plaintiffs no longer sought "an amount equal to" their increased costs for health care, they now sought "an amount *of damages* equal to" their increased costs. (First Amended Complaint pp. 9-10, ¶ C [emphasis supplied])

REASONS THE WRIT SHOULD NOT BE GRANTED

I.

THE DECISION BELOW FAITHFULLY FOLLOWED THIS COURT'S PRIOR PRONOUNCEMENTS.

a. Whether a party is entitled to a jury trial under the Seventh Amendment depends on whether his claim is equitable or legal in nature. The Court of Appeals correctly stated and applied the applicable legal standard: the two-part test prescribed by *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990). First, the Court must "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity." *Id.* at 565. Second, it must "examine the remedy sought and determine whether it is equitable or legal in nature." *Id.* The second inquiry is more important. *Id.* The remedy factor is

so much more important that one Justice advocated discarding the first factor entirely as useless, because the remedy trumps it every time. *Id.* at 574 (Brennan, J.).

The court below correctly stated and applied the *Terry* test. Petitioners acknowledge that *Terry* provides the touchstone. (Pet. 6) They simply disagree with that Court's application of the second, more important inquiry. This Court normally does not grant a petition when the asserted error consists of the misapplication of a properly stated rule of law. S. Ct. R. 10. It should not grant the petition in this case.[2]

b. This case is not just analogous to, it is, a breach of trust case and equitable under 18th-Century practice. This case is brought by beneficiaries of a welfare benefit plan against the administrators of the benefit plans. (First Amended Complaint ¶ 45) In *Terry*, the entire Court agreed that an action by a trust beneficiary against a trustee is equitable in nature, and no jury trial would be available. *Terry*, 494 U.S. at 566 (Marshall, J.); *Id.* at 583 (Stevens, J.); *Id.* at 585 (Kennedy, J., dissenting).[3] In *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993), this Court reiterated that the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach

---

[2] Respondents disagree with two aspects of the Court of Appeals's analysis. The Court of Appeals analogized this case to a breach of contract case; it is, on the contrary, a breach of trust case. (Pet. App. 20a) That Court also held incorrectly that it could disregard ERISA in an action to recover future benefits under an ERISA-regulated benefit plant. (Pet. App. 19a n.11) But the dispositive issue was the equitable nature of the relief sought, and that Court's analysis was correct on that issue.

[3] Justice Brennan's concurring opinion did not address this point, because it advocated dropping the 18th-Century analog test altogether. 494 U.S. at 574 (Brennan, J.).

of trust, so any such action under ERISA is equitable in nature. ERISA federalized the law of trusts as it applied to pension and welfare benefit plans, and courts must be guided by equitable trust law principles in deciding benefits cases under ERISA. *Varity Corp. v. Howe*, 116 S. Ct. 1065, 1170 (1996); *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989). ERISA, and the principles of trust law federalized by ERISA, apply to benefit plans established through collective bargaining. ERISA § 4(a)(3), 29 U.S.C. § 1003(a)(3); *Milwaukee Brewery Workers' Pension Fund v. Jos. Schlitz Brewing Co.*, 115 S. Ct. 981 (1995); *Firestone*, 489 U.S. at 110-11; *Central States, Southeast and Southwest Areas Pension Fund v. Central Trans., Inc.*, 472 U.S. 559, 570 (1985) (involved both pension and welfare plans); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-34 (1981).

Petitioners cannot obtain a jury trial simply because LMRA § 301(a) provides an alternative jurisdictional basis. Even before ERISA was enacted, jury trial was not available in an action to recover retirement benefits under LMRA § 301 or diversity jurisdiction. *Porter v. Central States, Southeast and Southwest Areas Pension Fund*, 98 L.R.R.M. (BNA) 3210, 3211 (N.D. Iowa 1978); *Davis v. Huge*, 91 L.R.R.M. (BNA) 2234, 2235 (E.D. Ky. 1975); *Sichko v. Lewis*, 191 F. Supp. 68 (W.D. Pa. 1960); *Accord Nedd v. United Mine Workers*, 556 F.2d 190, 207 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (no jury trial in pre-ERISA action by beneficiaries against pension fund fiduciaries brought under LMRA § 301); *Local No. 92, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers v. Norris*, 383 F.2d 735, 740-41 (5th Cir. 1967) (no jury trial in action for accounting against fiduciary under LMRDA

§ 501). All those cases recognized that the action was essentially an equitable action in trust. *Cf. McCraw v. United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Indus.*, 341 F.2d 705, 709 (6th Cir. 1965) (no jury trial in action for reinstatement in union under LMRDA §102, where money damages sought were incidental to equitable relief).

A plaintiff's claim to benefits under collectively-bargained welfare plans states only a single cause of action, although he may cite two jurisdictional statutes. *Slaughter v. AT&T Info. Sys. Inc.*, 905 F.2d 92, 93-94 (5th Cir. 1990) (claims under ERISA and LMRA state same cause of action). An action to recover benefits is equitable in nature, even when the plaintiff seeks those benefits under both LMRA § 301 and ERISA § 502. *See, e.g., United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499, 1509-10 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *United Steelworkers v. New Jersey Zinc Co.*, 828 F.2d 1001, 1004 (3rd Cir. 1987); *Unitis v. JFC Acquisition Co.*, 643 F. Supp. 454, 461 (N.D. Ill. 1986); *United Electrical Workers v. Amcast Indus. Corp.*, 634 F. Supp. 1135, 1144 (S.D. Ohio 1986).

These decisions contradict Petitioners' argument that every case brought under LMRA § 301 is a "breach of contract" case, and thus legal. This Court has rejected that broad argument that all LMRA § 301 cases are analogous to breach of contract cases, in *Terry*, 494 U.S. at 568. *Not one justice* there opined that *Terry* was just a breach of contract case, or that all LMRA § 301 cases are legal in nature. Collective bargaining was illegal at common law, so there was no 18th-Century analog in breach of contract. *Id. Terry* was a "hybrid" § 301 case: union members claimed that their employer breached the collective bargaining agreement, and that their union breached its duty of fair representation by failing to pursue their

grievances. The four Justices who joined Part III-A of the lead opinion thought that case evenly split between two 18th-century analogs—breach of trust (equitable) and breach of contract (legal)—and that issue too close to call. 494 U.S. at 568-70. Only one Justice thought the case had a legal 18th-century analog—but the analog was legal malpractice, not breach of contract. *Id.* at 582. What tipped the case toward the law side, and a jury trial, was the remedy sought: damages. *Id.* at 570-72.

An action by a plan beneficiary against a plan administrator to recover benefits under the terms of an ERISA-regulated benefit plan, of course, is not so split: it is not just analogous to, it *is*, a breach of trust case and inherently equitable. *Id.* at 566, 583, 585 (action by beneficiary against trustee is equitable and jury trial is not available); *Mertens*, 113 S. Ct. at 2068 (action by beneficiary is equitable); *Firestone*, 489 U.S. at 111 (law of employee benefits is federalized law of trusts).

c. Petitioners' argument that this is a simple contract case ignores the kind of "contract" involved here, and the kind of claim.

First, the "contracts" establish "welfare benefit plans" under ERISA. In the LMRA Count Plaintiffs describe them as "a series of collective bargaining agreements *and related benefit plans.*" (First Amended Complaint ¶ 30 [emphasis supplied]; ¶¶ 31-35, 42 all refer to "the negotiated agreements and related benefit plans".) In this case, the CBAs at four of the five units[4] consisted of a basic agreement, separate pension agreement, and a separate insurance agreement. The latter two were incor-

[4] Except Gunite, where the bare bones of the health benefit plan were sketched out in the basic agreement.

porated by reference in each basic agreement, by their terms expired when the basic agreement did, and were exempted from the grievance procedure. It is the Insurance Agreements—the "related benefit plans"—that Plaintiffs are trying to enforce here. Plaintiff acknowledge that the contracts formed a "welfare benefit plan" under ERISA. (First Amended Complaint, Count II, ¶ 44)

Second, the "contracts" are *expired* contracts. They are no longer legally enforceable, and LMRA § 301 no longer provides the courts with subject matter jurisdiction to enforce the expired contracts. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 206 (1991). If the collective agreements are enforceable at all, it is because, as Plaintiffs allege, their health benefits "vested" on retirement, and the plan survives as a welfare benefit plan enforceable under ERISA § 502(a)(1)(B)—a constructive trust, requiring Kelsey-Hayes and Hayes Wheels to provide benefits to beneficiaries for their future welfare. "Trust," "benefits," "beneficiaries," "vesting," and future maintenance are trust concepts, not contract concepts. And actions by trust beneficiaries are equitable in nature.

Third, the "contracts" are contracts to which Plaintiffs are not parties. They are third- party "beneficiaries" of the contracts, that is, of the welfare benefit plan. ERISA § 3(8), 29 U.S.C. § 1002(8).[5] They sue Kelsey-Hayes and Hayes Wheels in their capacity as "administrators" of the

[5] Plaintiffs alleged that they are "participants," ERISA § 3(7), 29 U.S.C. § 1002(7), but only eight of them are. A "participant" must be a present or former employee, and the three surviving spouses are not. All eleven of them are "beneficiaries." ERISA § 3(8), 29 U.S.C. § 1002(8). Ida Thomason was neither, and her claim has been dismissed in the District Court; she is no longer a Plaintiff, and not really a Petitioner here.

welfare benefit plans.[6] A "beneficiary" of a trust had no cause of action at law in the 18th Century. His interest was purely equitable, his remedies only equitable, and his claims against either the trustee or any third party could be entertained only in equity. IV SCOTT ON TRUSTS § 281, p. 2332 (3d ed. 1967); *Smith's Lessee v. McCann*, 65 U.S. (24 How.) 398, 406 (1860); *Nedd*, 556 F.2d at 207.[7]

Fourth, the LMRA and ERISA claims in this case are not "separate and distinct," as Petitioners argue. In their Motion for Preliminary Injunction, they made no distinction between an LMRA claim and an ERISA claim. They relied not only on collective bargaining agreements, but very heavily on the summary plan descriptions ("SPDs")—a document that ERISA requires the administrator to prepare, in order to inform beneficiaries of the terms of the benefit plan. ERISA § 101(a), 29 U.S.C. § 1021(a). (R.4, Plaintiffs' Brief Supp. Mtn. Prelim. Inj. 7-10, 12-15) Plaintiffs cited to ERISA § 102(b), 29 U.S.C. § 1022(b), and to

---

[6] First Amended Complaint ¶ 45. *See* ERISA § 3(16), 29 U.S.C. § 1002(16) (definition of "administrator"); *Daniel v. Eaton Corp.*, 839 F.2d 263, 266 (6th Cir.), *cert. denied*, 488 U.S. 826 (1988); *UAW v. Auto. Glass Employees Fed'l Credit Union*, 146 L.R.R.M. (BNA) 2865, 2873 (M.D. Tenn. 1994), *aff'd*, 72 F.3d 1243 (6th Cir. 1996) (action to recover benefits must be brought against plan administrator, not against employer-plan sponsor).

[7] A trust beneficiary had one cause of action at law against a trustee: he could sue at law for money that the trustee had an obligation to pay to the beneficiary immediately and unconditionally—that is, if the trustee admitted liability. *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d. 820, 829 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Nedd*, 556 F.2d at 207. But the benefits Plaintiffs seek to recover under the terms of the benefit plan are not payable either (1) to the beneficiary, (2) immediately, or (3) unconditionally. Rather, they are paid to health care providers, at various times in the future, if the plan's coverage conditions are met.

Department of Labor regulations issued under ERISA, concerning information that is required to be in the SPD. (Plaintiffs' Brief 13) They cited cases decided under ERISA for the proposition that language in an SPD takes precedence over inconsistent language in a CBA or other plan document. *Flacche v. Sun Life Assurance Co.*, 958 F.2d 730 (6th Cir. 1992); *Edwards v. State Farm Mut. Auto Ins. Co.*, 851 F.2d 134 (6th Cir. 1988). (Plaintiffs' Brief 11, 13-14) Plaintiffs had to rely heavily on ERISA, because the only "lifetime" language in plan documents appeared in the SPDs—*not* in the CBAs. Plaintiffs' ERISA-SPD argument constituted the core of their motion for preliminary injunction. (Pet. App. 59a-60a) These are not separate claims at all.

Thus this LMRA claim is neither a simple contract case, nor separate from the ERISA claim.

d. The remedy sought is by far the more important of the two *Terry* factors. *Terry*, 494 U.S. at 565. Petitioners acknowledge they have "no adequate remedy at law" under either LMRA § 301 or ERISA. (Complaint ¶¶ 32, 33; First Amended Complaint ¶¶ 42, 43; Pet. App. 26a) They could not have obtained the preliminary injunction without establishing both an inadequate remedy at law, and irreparable injury without an injunction. (Pet. App. 26a) They seek a *permanent* (not just a preliminary) injunction directing Kelsey-Hayes and Hayes Wheels to "reinstate the health benefits . . . for the lives of retirees and spouses." (First Amended Complaint, ¶ B of each Count) Unlike pension benefits, the welfare benefits at issue in this case are not payments to the beneficiaries; normally the plan administrator makes payment directly to health care providers. All the beneficiary has to do at the doctor's office is show his plan identification card. The preliminary injunction has already been in effect for 25

months, with no trial date in sight. A permanent injunction could easily require provision of benefits for 40 or 50 years. An injunction is the quintessential equitable remedy.

Plaintiffs cannot recover "damages" of any kind. The only prayer for "damages" in their original Complaint was paragraph D of each Count, seeking mental distress damages. Damages for mental distress and anguish cannot be recovered in any action to recover benefits, under either LMRA § 301 or ERISA § 502(a). *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-44 (1985); *UAW v. Park-Ohio Indus.*, 687 F. Supp. 338, 342-43 (N.D. Ohio 1987), *aff'd*, 876 F.2d 894 (table) (6th Cir. 1989). Indeed, Plaintiffs stipulated to strike that prayer, recognizing that the law does not authorize mental distress damages. The District Court struck that prayer in the same Order that struck the Jury Demand. (Pet. App. 37a, 52a)

The First Amended Complaint recharacterized the prayer for "an amount equal to" the pensioners' increased share of health care expenses as one for "an amount of damages equal to." (Paragraph C of each Count) But this Court must focus not on what remedies Plaintiffs seek, but on what remedies are available to them. *Richards v. General Motors*, 850 F. Supp. 1325 (E.D. Mich. 1994). And they cannot recover damages for breach of an ERISA-regulated welfare benefit plan. ERISA limits Plaintiffs to equitable remedies. ERISA excludes recovery of compensatory damages of any kind. *Mertens*, 113 S. Ct. at 2068-70; *Russell*, 473 U.S. at 144; *Howe v. Varity Corp.*, 36 F.3d 746, 752 (8th Cir.), *clarified*, 41 F.3d 1263 (8th Cir. 1994), *aff'd*, 116 S. Ct. 1065 (1996); *Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987). To the extent that LMRA might otherwise authorize recovery of damages, ERISA's exclusion of damages must control. ERISA § 514(d), 29 U.S.C.

§ 1144(d);[8] *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375-76 (1990) (ERISA's special anti-alienation provision, § 206(d)(1), 29 U.S.C. § 1056(d)(1), controls over general remedial provision in LMRDA § 501(b), 29 U.S. C. § 501(b)); *United Steelworkers v. United Engineering, Inc.*, 52 F.3d 1386, 1394 (6th Cir. 1995) (ERISA precludes previously-existing cause of action implied from LMRA § 301); *Pension Benefit Guar. Corp. v. Alloytek, Inc.*, 924 F.2d 620, 626 (6th Cir. 1991).

e. Plaintiffs do seek to recover some money: the monthly premiums at $2.00 per month or more, the Special Age 65 benefit, and their expenditures for co-payments under the new benefit plan—for about one-third of the class, and only for the 3+ months before the preliminary injunction took effect. But not every award of monetary relief is "damages," or legal relief. *Terry*, 494 U.S. at 570-72. The Special Age 65 benefit, and the monthly premium deducted from the pension check, are money withheld by the plan administrator. Recovery of this amount is "restitution," an equitable remedy warranting no jury trial. *Id.* at 570 (recovery of money wrongfully withheld is restitutionary); *Howe*, 36 F.3d at 752; *Bair v. General Motors Corp.*, 895 F.2d 1094, 1096 (6th Cir. 1990).

Plaintiffs analogize the recovery they seek to back pay, and argue that back pay is a form of damages, hence legal. That is a misstatement of the law. The *equivalent* of back pay is damages, if it is recovered from the union in a "hybrid" § 301 case. *Terry*, 494 U.S. at 572. But back

---

[8] ERISA's saving provision, § 514(d), preserves federal "law[s]" and "regulation[s]." It does not, however, preserve inconsistent judicial "decisions"—in bright contrast to § 514(c), which defines preempted "State law" as including "decisions." 29 U.S.C. § 1144(c), (d).

pay from the *employer* under an equitable statute is restitutionary, and equitable. *Terry*, 494 U.S. at 569-70; *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1490 (1994); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-18 (1975); *Schwartz v. Gregori*, 45 F.3d 1017, 1022 (6th Cir.), *cert. denied*, 116 S. Ct. 77 (1995).

Moreover, restitution for 3½ months of premiums and co-payments, for one-third of the class, until the District Court entered a preliminary injunction, is "incidental to or intertwined with injunctive relief" and thus equitable, not legal. *Terry*, 494 U.S. at 571; *Tull v. United States*, 481 U.S. 412, 424 (1987); *Alexander v. Primerica Holdings, Inc.*, 819 F. Supp. 1296, 1308-09 (D. N.J. 1993); *Sprague v. General Motors*, 804 F. Supp. 931, 939 (E.D. Mich 1992) (latter two cases weighing prospective duration of injunction against retrospective period of benefit loss in which expenses incurred).

Petitioners' argument, if accepted, would produce absurd consequences. Plaintiffs filed their motion for preliminary injunction on December 23, 1993—the last court day before Christmas, and four court days before the benefit changes went into effect. Presumably they did this for tactical reasons, to impair Kelsey-Hayes' ability to respond. If, instead of delaying six months, Plaintiffs had brought this action in May 1993, and the preliminary injunction hearing had been held in October or November 1993, then the benefit changes would not have gone into effect. Under their argument there would be no co-payments, deductibles or monthly contributions, and no "damages," hence no jury trial.

Whether an action is equitable or legal should not turn on how diligent, or how busy, Plaintiffs' counsel is; how crowded the court's docket is; or on the effect of tactical delay. And it does not: the right to jury trial turns on

the nature of the issue to be tried, and the remedy sought. *Terry*, 494 U.S. at 567. The fact that a tiny fraction of the benefits sought are now allegedly past due, solely because Plaintiffs' attorney appears to have deliberately delayed for strategic reasons in filing the case and motion, does not affect the equitable nature of this action. An equitable claim for benefits does not become legal just because part of the benefits are already due, or because the plaintiff waits until after the benefit reduction goes into effect to seek an injunction. *Borst v. Chevron Corp.*, 36 F.3d 1308, 1324 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1699 (1995); *Bair*, 895 F.2d at 1097; *Cox v. Keystone Carbon Co.*, 894 F.2d 647, 649-50 (3d Cir.), *cert. denied*, 498 U.S. 811 (1990); *Sprague*, 804 F. Supp. at 935.

Moreover, even under Petitioners' argument, the majority of the class has no right to jury trial under LMRA § 301. No changes were implemented in January 1994 for retirees from the Brighton-Milford, Michigan unit. They have incurred no out-of-pocket expenses, suffered no "damages"; they seek only declaratory and injunctive relief. UAW Local 78 (the Detroit/Romulus bargaining unit, by far the largest) agreed with Kelsey-Hayes and Hayes Wheels on February 1, 1994, to reinstate the old benefit plan retroactive to January 1, 1994, with no co-pays, deductibles or contributions—except a $2.00/month contribution, deducted from the pension check, but only for pensioners who are over age 65 and Medicare-eligible. Thus no Detroit or Romulus pensioner incurred out-of-pocket expenses; and recovery of the $2.00 monthly contribution is clearly restitutionary, not damages. So under Petitioners' view, even though they assert the *same claim* on behalf of retirees from all five bargaining units, and seek the *same permanent injunction* on behalf of all, that claim is "equitable" when asserted on behalf of Detroit,

Romulus, Brighton and Milford pensioners, but "legal" when asserted by SPECO, Heintz and Gunite pensioners. Such a result would be absurd. But it is the inevitable conclusion of Petitioners' argument.

f. This Court has twice confirmed that a monetary award "incidental to or intertwined with injunctive relief" is equitable in nature. *Terry*, 494 U.S. at 571; *Tull*, 481 U.S. at 424-425. In *Tull* the Court, although recognizing this long-established principle, held that the award of monetary relief was not incidental in *that* case. That case involved a preliminary injunction of short duration and limited effect, and a civil penalty of $22 million. In *Tull* it was the injunction that was incidental, not the money. But the injunction is the engine that drives this case, as the court below recognized.

Lytle v. Household Mfg., Inc., 494 U.S. 545, 550 (1990); *Curtis v. Loether*, 415 U.S. 189, 193 (1974); and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), on which Petitioners rely, are irrelevant to the analysis. Each holds that when a legal claim and a separate equitable claim are joined, a party is entitled to a jury trial on the legal claim; and *Lytle* holds that jury trial applies to overlapping elements of the equitable claim. In *Curtis* and in *Dairy Queen*, the Court held that a legal *claim* could not be characterized as "incidental" to a separate equitable claim. But this case does not involve separate claims. Moreover, *Curtis* and *Dairy Queen* did not disturb the long-established rule, later recognized in *Terry* and in *Tull*, that monetary *relief* is equitable if it is "incidental to or intertwined with" equitable relief on the same claim. This Court made that distinction carefully in *Tull*; the court below made that distinction just as carefully and correctly. Thus, none of the three cited cases is useful in determining whether a particular claim is legal or equitable in the first place.

Petitioners argue that this Court did not mean what it said in *Tull* and *Terry*; they argue that the "incidental" rule applies only when the plaintiff seeks only equitable relief, either by choice or because the statute provides only equitable jurisdiction (Pet. 9) Petitioners did not make that argument in the courts below. That novel argument notably is not supported by any statement in *Tull* or in *Terry*, or by any other precedent: Petitioners cite none for it.[9] In *Tull*, the plaintiff sought both legal and equitable relief: civil penalties and a preliminary injunction. *Tull* held that, when the plaintiff seeks both, the court can and must determine whether the monetary relief sought really is "incidental to or intertwined with" equitable relief. And the court cannot just take the plaintiff's word for it.

The court below correctly stated, and very carefully applied, the rule of law laid out in *Tull* and *Terry*.

Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 749 (D.C. Cir.), *cert. denied*, 116 S. Ct. 180 (1995), purported to make the same error that Petitioners urge upon this Court and the Court below: failing to distinguish between *Dairy Queen's* focus on separate "claims" and *Tull's* focus on incidental "relief" on the same claim. But *Crocker* really turned on: (1) the fact that the statute involved, unlike ERISA, did not confine the plaintiff to equitable remedies, 49 F.3d at 748; and (2) his claim for backpay was not actually incidental to his equitable prayer for reinstatement as a pilot—the latter moot because he was then nearly 70 years old, *id.* at 748 n.3. The quantitative weighing of relief in *Crocker* is exactly the weighing this Court performed in *Tull*.

---

[9] Petitioners' argument, even if it held water, would not prove the court below wrong, because ERISA does limit Plaintiffs to equitable remedies.

II.

THE DECISION BELOW DID NOT CREATE A SPLIT BETWEEN THE CIRCUITS.

a. Petitioners' claim that the decision below raised a conflict with a decision of another United States Court of Appeals is a misstatement of law. The decision below was consistent with the uniform precedent of all the Circuit Courts of Appeal. No Circuit Court of Appeals has ever allowed a jury trial in an action to recover benefits—with one exception, an Eleventh Circuit case decided a few weeks *after* this one.

Every Circuit Court of Appeals to consider the question has held that jury trial is not available in an action to recover benefits, or other action by a plan beneficiary against a plan fiduciary. The more recent decisions recognize that *Terry* and *Mertens* confirm the no-jury rule. *See, e.g., Sullivan v. LTV Aerospace & Defense Co.*, ___ F.3d ___, 1996 U.S. App. LEXIS 10253, *21 (2nd Cir. May 6, 1996) (no jury trial in action to recover ERISA benefits, even where only monetary recovery is sought); *Houghton v. SIPCO, Inc.*, 38 F.3d 953, 957 (8th Cir. 1994) (*Mertens* confirms rule of non-jury trial); *Borst*, 36 F.3d at 1324 (*Terry* requires non-jury trial in benefits case); *Spinelli v. Gaughan*, 12 F.3d 853, 857-58 & n.3 (9th Cir. 1993); *Biggers v. Wittek Indus.*, 4 F.3d 291, 297-98 (4th Cir. 1993); *Blake v. Unionmutual Stock Life Ins. Co.*, 906 F.2d 1525, 1526 (11th Cir. 1990); *Bair*, 895 F.2d at 1097; *Daniel*, 839 F.2d at 268; *Brown v. Retirement Comm. of Briggs & Stratton*, 797 F.2d 521, 528 (7th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *Turner v. CF & I Steel Corp.*, 770 F.2d 43, 46-47 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *Katsaros v. Cody*, 744 F.2d 270, 278 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984); *Wardle*, 627 F.2d at 829. Several of these cases—*Daniel*, *Brown*, and *Wardle*—

involved benefit plans established through collective bargaining. *Daniel* involved an alleged breach of a collectively-bargained pension agreement with the UAW. The Third and Fifth Circuits have ruled, even before ERISA, that an action against a plan fiduciary under LMRA or LMRDA was equitable, with no jury trial allowed. *Nedd*, 556 F.2d at 207; *Norris*, 383 F.2d at 740-41.

Petitioners fail to cite any of the dozens of decisions that disallow jury trials in actions to recover benefits—an omission particularly glaring in the cases of *Nedd*, *Norris*, *Daniel*, *Wardle* and *Brown*, all of which involved collectively-bargained benefit plans. The claim of a split between circuits is a misstatement of the law.

b. Petitioners claim that the Seventh Circuit has concluded that a jury trial is available in an action for retiree health benefits brought under both the LMRA and ERISA, *citing Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 609 (7th Cir. 1993) (*en banc*), *cert. denied*, 114 S. Ct. 291 (1993); *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806, 814 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2992 (1993). (Pet. at 14 & n.10) That is a misstatement of the law.

The rule in the Seventh Circuit is that the plaintiff cannot have a jury trial in an action to recover benefits, even if part of the benefits are already due, and even if the benefit plan is the product of collective bargaining and enforceable under LMRA § 301. *See Wardle*, 627 F.2d at 829; *Brown*, 797 F.2d at 528. The *Wardle* case is the seminal case nationally. It involved a benefit plan established through collective bargaining, and the Plaintiff sought "compensatory damages", *i.e.*, the present actuarial value of his claimed pension, some of which was (he alleged) already due. The court found the action to be an action in trust seeking equitable relief.

The *Senn* panel stated in dictum that jury trial was available in that case. But the *holding* in *Senn* was that the District Court committed reversible error in submitting the case to a jury: the case should have been decided as a question of law, and defendants' motions for summary judgment and directed verdict should have been granted. *Senn*, 951 F.2d at 815. That holding made it unnecessary to address the jury trial question. *Sofo v. Pan Am. Life Ins. Co.*, 13 F.3d 239, 241-42 (7th Cir. 1994). As dictum, the *Senn* discussion has no *stare decisis* effect in the Seventh Circuit; *Wardle* and *Brown* do, in the collective bargaining context. The rule in the Seventh Circuit remains the same after *Senn*: no jury trials in actions to recover benefits, even if part of the benefits are already due and the plaintiff calls it "damages", even where the claim is brought under the LMRA and based on a collective bargaining agreement. *Reich v. Continental Casualty Co.*, 33 F.3d 754, 755-56 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1104 (1995) (suit to recover money is restitution, and necessarily equitable, because ERISA provides only equitable relief, so no jury trial, *citing Wardle*); *Sofo*, 13 F.3d at 241; *Meredith v. Allsteel, Inc.*, 1994 U.S. Dist. Lexis 9861, *14-16 & n.13 (N.D. Ill. July 19, 1994) (striking jury demand where identical equitable relief recovery of pension benefits sought under LMRA and ERISA; cites *Wardle*, *Brown*, and *Sofo*, and distinguishes *Senn* on basis of relief sought).

The holding in *Bidlack* was that the district court erred in granting summary judgment; jury trial was again simply not an issue.

Thus the decision below did not create a conflict with any decision—not one—of any other United States Court of Appeals. Petitioners' claim of a conflict between the Sixth and Seventh Circuits is a misstatement of law.

c. A conflict arose several weeks later, when the Eleventh Circuit Court of Appeals decided *Stewart v. KHD Deutz Corp.*, 75 F.3d 1522 (11th Cir. 1996). But *Stewart* does not create a conflict significant enough to warrant granting a writ of certiorari either in this case, or in *Stewart* if one is filed.

First, except for *Stewart*, all the Courts of Appeals agree: no jury trial is allowed in an action to recover benefits. Even the Eleventh Circuit agrees that jury trial is improper in an ERISA-only action to recover benefits. *Stewart*, 75 F.3d at 1527; *Blake*, 906 F.2d at 1526. The *Stewart* case presents a sport, not a split. There is no real division of opinion on this issue. One wrong decision out of dozens—one Circuit divided against itself—does not present a conflict significant enough to warrant this Court's attention.

Second, the Eleventh Circuit should be given an opportunity to heal itself, by overruling *Stewart en banc* in light of the Sixth Circuit decision in this case. Unfortunately, that Court may not get the chance in *Stewart* itself. In that case, KHD Deutz has filed a petition for panel rehearing, but has not suggested rehearing *en banc*. The briefs failed to make the critical distinction between *Tull* and *Dairy Queen*, between incidental relief and incidental claims; failed to inform the Court that the statement in *Senn* was mere dictum, and the actual Seventh Circuit rule exactly the opposite; and failed to inform the Court of *Nedd*, *Norris*, *Daniel*, *Wardle*, *Brown*, and other jury-trial cases involving collectively-bargained benefit plans. *Stewart* was wrongly decided: but wrongly decided, at least in part, because the issue was not adequately presented to that Court—and apparently would not be adequately presented to this Court. The Eleventh Circuit may have to await another day, and proper briefing, to correct its error *en banc*.

Third, the error in *Stewart* is unlikely to cause significant harm to future litigants if left temporarily uncorrected. Benefit cases involving requests for jury trials under the LMRA will arise less frequently in the Eleventh Circuit; they will rise more frequently in the more populous, more industrialized—and more unionized—Third, Sixth, Seventh and Eighth Circuits, all of which correctly bar jury trials in such circumstances.

There is therefore no need for the Court to consider this issue at this time.

Respondents therefore urge the Court to deny the petition for writ of certiorari in this case, and in *Stewart* if one is filed.

Respondents further urge the Court not to grant a petition in *Stewart* unless it is accompanied by this case, in order to assure an adequate presentation of the issues to this Court.

CONCLUSION

Respondents KELSEY-HAYES COMPANY and HAYES WHEELS INTERNATIONAL, INC. pray this Court to DENY the Petition for Writ of Certiorari.

Respectfully submitted,

JULIA A. MARTIN
Counsel of Record
KIRK D. MESSMER
MATKOV, SALZMAN, MADOFF & GUNN
55 East Monroe Street, Suite 2900
Chicago, Illinois 60603
(312) 332-0777

Attorneys for Respondents